TEXACO INC.

IBLA 87-708 Decided December 11, 1989

Appeal from a decision of the Director, Minerals Management Service, denying refund request of royalty overpayments for two Outer Continental Shelf Lands Act leases, OCS G-2388 and OCS G-2389. MMS-86-0435-OCS.

Affirmed as modified.

1. Outer Continental Shelf Lands Act: Refunds

   MMS may not deny a request for refund of royalties from a holder of one of several working interests in a lease who remits royalties on its own behalf (i.e., a payor) on the grounds that the payor has not made a showing that the lease accounts as a whole were overpaid.

2. Outer Continental Shelf Lands Act: Refunds

   Where there are a number of individual working interest payors on a lease, MMS may not grant a request for a refund of royalties, even if it is established that a total lease overpayment has occurred, unless the payor requesting the refund can show that it submitted the royalty overpayment.

APPEARANCES: Wendy F. Daboval, Esq., New Orleans, Louisiana, for appellant; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Texaco Inc. has appealed from a decision of the Director, Minerals Management Service (MMS), dated June 12, 1987, denying a refund request filed by Texaco U.S.A. (Texaco). The facts upon which this decision turns are not in dispute.

Texaco held a 19.67 percent working interest in Outer Continental Shelf (OCS) leases OCS G-2388 and OCS G-2389. During the 3-month period from August through October 1982, Texaco did not receive any gas produced from these leases. Rather, Pennzoil Exploration and Production Company (Pennzoil) took all gas produced from these two leases during this period.

Pursuant to section 3.001 of the Payor Handbook (dated February 1982), which required royalty payments to be made on the basis of working inter-est entitlements, Texaco tendered to MMS a total of $263,543.98 in payment of the production allocated to its 19.67 percent working interest.

Effective December 1, 1982, however, MMS amended this provision of the Payor Handbook to require that payments be made only on the amounts actually taken by the working interest owners. See Addendum No. 1, issued November 1982. Appellant admits that nothing in this addendum indicated that it was to have retroactive application. Nevertheless, by letter to its co-owners, dated July 26, 1983, Pennzoil informed them of its intent to retroactively apply the new procedures to royalty payments for the period in issue and, accordingly, to submit to MMS royalty payments for this period based on the quantities which it actually took. 1/ The effect of this procedure was that Pennzoil would be tendering royalties on Texaco's 19.67 percent working interest, which royalties Texaco had already submitted.

By letter dated August 3, 1983, Texaco filed a request for a refund of the $263,543.98 royalty that it had paid to MMS on the entitlement basis for the period in question noting that Pennzoil would, in the near future, be tendering royalty for the same gas based on the take basis. Texaco requested that MMS initiate actions to refund to Texaco the $263,543.98 which it had previously remitted. 2/

Thereafter, by letter dated September 30, 1985, the Regional Manager, Houston Royalty Compliance Office (HRCO), informed Texaco of its prelimi-nary determination that no royalty in excess of the amount lawfully required had been paid by Texaco, concluding that "Texaco correctly reported sales and royalty on entitled quantities for August 1982 through October 1982 in accordance with the Payor Handbook, February 1982 (Section 3.0001-3), and therefore, is not entitled to the requested refund." This letter afforded Texaco 30 days in which to inform HRCO of its concurrence in the findings or of its reasons for nonconcurrence therein.

In response to this preliminary determination, Texaco replied, by letter dated October 24, 1985, that it disagreed with the preliminary determination that its claim for a refund should be rejected. This letter

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1/ Pennzoil justified its retroactive application of the Addendum by noting that it had contacted its co-owners and found that, during the 3-month period in question, some had paid royalties based on their entitlements, some had originally submitted royalties based on their entitlements but subsequently corrected their submissions to show only the amounts actually taken, and some had never paid royalties based on entitlements.

2/ This letter referenced an attachment, Form 9-2014, which, along with a number of other documents including copies of the relevant portions of the February Payor Handbook and the December Addendum to the Handbook, was not included in the case file transmitted to the Board by MMS. It goes without saying that the failure of MMS to submit all relevant documentation needlessly delays ultimate adjudication of appeals by this Board. See generally Dugan Production Corp., 103 IBLA 362 (1988).

noted, inter alia, that "Texaco correctly reported sales and royalties on entitled quantities as instructed by the Payor Handbook of February 1982," that these instructions had been revised effective December 1, 1982, to require the reporting of sales and royalties on the basis of the quanti-ties actually taken and that Pennzoil had interpreted this revision to be retroactive to the period in question. Texaco further argued that, to its knowledge, Pennzoil's retroactive repayment was not challenged by MMS. 3/ Texaco concluded by noting that:

> It has taken MMS over 2 years to respond to Texaco's refund request. If Texaco's royalty payment has been determined to be correct then we conclude that Pennzoil's retroactive adjustment was improper. However, the absence of a timely response from the MMS has precluded Pennzoil from filing for a refund within the two year limitation period.

(Letter of Oct. 24, 1985, at 2).

On April 21, 1986, the Manager, HRCO, again wrote to appellant. In this letter, he noted that, even though Texaco had agreed with his preliminary findings that it had properly paid royalty based on entitlements, Texaco was still maintaining that it was entitled to a refund based on its assertion that Pennzoil had adjusted its prior submissions so that it, too, had tendered royalties on the quantities in question. With reference to this allegation, the Regional Manager requested that Texaco submit documentation for all payors detailing, by payor, lease, and month, sales and royalty values and the royalties actually paid.

On May 20, 1986, Texaco responded that the status of other payors was not relevant to the establishment of duplicate payments by Texaco and Pennzoil. Texaco objected to the suggestion that a duplicate payment could be applied to offset an underpayment by another payor. The file does not indicate that Texaco submitted any further substantive response to the MMS request for information.

By decision dated July 7, 1986, the Manager, HRCO, denied appellant's request for a refund, reiterating his conclusion that Texaco had correctly reported sales and paid royalties for the period from August 1982 through October 1982 on the basis of entitlements and that, therefore, Texaco had made no royalty payments in excess of those required by law. Texaco thereupon appealed to the Director, MMS.

On June 12, 1987, the Director affirmed the decision of the Manager, HRCO. But, while the Director agreed that no refund was owing, he pre-mised this conclusion on a different rationale than that used by the Manager, HRCO. Thus, the Director noted that under the leases in question

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3/ On this point, however, while there is no direct evidence in the pres-ent record that Pennzoil actually made such a retroactive payment nor has appellant submitted evidence that such a payment occurred, there are at least strong indications that Pennzoil did, in fact, retroactively submit royalties for the period based on the amount of gas which it took.

all parties holding an undivided interest are equally responsible for all rentals and royalties, citing Continental Oil Co., 74 I.D. 229 (1967). From this, the Director concluded that, in order for Texaco to obtain a refund, it was required to show that each lease account, as a whole, was in an overpayment status (Decision at 6). The Director held that, inasmuch as Texaco had declined an invitation to make such a showing, the decision of the Manager, HRCO, refusing a refund was correct. 4/ Texaco thereupon appealed to this Board.

In its appeal, Texaco reiterates the arguments which it made before the Regional Manager, HRCO, and the Director. Texaco strongly objects to the MMS requirement that it establish that each lease account, as a whole, was in an overpayment status. Thus, Texaco notes:

> Texaco maintains that the MMS has no right to require a payor to conduct what amounts to a full audit on the lease before considering a request for a refund. Texaco not only does not have ready access to such information but does not have the right to obtain access to this information. The terms of gas sales contracts, especially as to price, are confidential and dissemination of this information between producers has anti-trust implications. Furthermore, Texaco strenuously points out that the information requested by the MMS is already in its possession. The MMS has the capability, where Texaco does not, to determine if the lease is in net positive balance.

(Statement of Reasons at 3). In response, MMS argues that section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1139(a) (1982), authorizes a refund only where an individual has shown to the satisfaction of the Secretary that an overpayment has occurred. MMS argues that the Secretary has broad latitude to determine if an overpayment has been made and that, until it has been demonstrated that the lease, as a whole, is in overpayment status, appellant's request for a refund was properly denied (Answer at 2-3).

[1] The Board has recently addressed the position taken by MMS that it may require an individual payor to affirmatively establish that the lease, as a whole, is in an overpayment status as a precondition to processing a refund request. Thus, in Mesa Petroleum Co., 107 IBLA 184 (1989), we examined whether the individual payor or MMS should bear the burden of establishing total lease overpayment. 5/ After reviewing the

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4/ The Director also noted that "there was no warrant for Pennzoil's unilateral retroactive adjustment," inferentially agreeing with appellant that Pennzoil had, in fact, subsequently tendered royalties on the basis of the amount of gas taken for this period. See note 3, supra.

5/ That decision assumed, without deciding, that MMS could properly deny a refund in those situations in which an individual payor could establish that it had made an overpayment but another party with a working interest in the lease had failed to tender its aliquot portion of the royalty. There, are, however, inherent difficulties with this approach. Thus, those

respective arguments of the parties, we concluded that "it is clear to us that it is more appropriate to have the agency that has that information and the resources to marshall it do so, rather than imposing the burden on the person who applies for a refund." Id. at 191. Thus, to the extent that MMS rejected the refund request because Texaco had failed to establish a total lease overpayment, it would be necessary, consistent with our analysis in Mesa Petroleum Co., supra, to remand the case file to MMS for it to determine whether a total lease overpayment exists. We decline to do so, however, as there is a more fundamental flaw in the MMS decision under review.

[2] The decision under appeal clearly held that, if appellant had been able to show a total lease overpayment, MMS would look favorably upon a refund of the monies owed to Texaco. The essential problem with this position is that it is quite clear that, if any overpayment existed, it was an overpayment on the part of Pennzoil, not Texaco. Texaco, in conformity with the rules then in effect, submitted royalty payments for the period from August through October 1982 on the basis of its entitled share of production. Thereafter, Texaco, once again in accordance with MMS instructions, altered its reporting to show quantities actually taken. In both instances, Texaco comported itself with the requirements of the applicable procedures. There is no evidence nor even any allegation by Texaco that it submitted more money than was properly owing for this period. Such overpayment as may have been made was caused solely by the unilateral action of Pennzoil in deciding to retroactively alter the basis for its prior submissions, switching from an entitlements to a take basis for the period in question.

Appellant attempts to suggest that this action by Pennzoil was precipitated by confusion engendered by MMS when it altered the basis for royalty computation in Addendum No. 1 to the MMS Payor Handbook. This argument must be rejected for two separate reasons. In the first place, appellant does not suggest that it was misled by the Addendum and it is difficult to perceive how appellant can bootstrap itself into a refund

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fn. 5 (continued)
who have been assigned responsibilities for payment of royalties (payors) are defined as lessees for the purposes of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C.A. § 1702(7) (1986). As such, individual payors are liable for both civil and criminal penalties for the under-reporting of royalties. See 30 U.S.C.A. §§ 1719, 1720 (1986). An analysis which looks to the total lease account as a determinant of the ability of individual payors to obtain a refund of an overpayment submitted by that payor would seem to require a similar advertence to the total lease account status as a precondition to the assessment of penalties. Such an approach would almost certainly undermine the entire civil penalty structure of FOGRMA. However, it is unnecessary for us to definitively resolve this issue since, for reasons set forth, appellant is unable to show that it has made an overpayment of royalty and thus it is not eligible for a refund, regardless of whether or not total royalty on the lease has been overpaid for the period in question.

based on the confusion of a third party where the confusion allegedly led that party to overpay its royalty obligations.

More importantly, the express terms of that Addendum 6/ lend no support to Texaco's argument that it was unclear whether or not the Adden-dum was intended to be retroactive. Thus, nothing in the Addendum affirmatively indicated that any type of retroactive adjustment was to be made. On the contrary, the Addendum started by expressly stating that "Effective December 1, 1982, each payor will report sales and royalties based upon actual quantities taken from a lease whether the quantities are less than, greater than, or equal to the volumes that the payor is entitled to take based upon working interest agreements" (Addendum No. 1 at 1 (emphasis supplied)). The specified reporting procedures clearly envisioned prospective applicability as they are couched in the future tense: "Payors will report quantities actually taken by working interests for which they have royalty responsibility. In months in which no quantity is taken, a payor will report zero sales for the selling arrangement(s) using transaction code 20" (Addendum No. 1 at 3 (emphasis supplied)). There is, in short, no factual basis for appellant's assertion that the Addendum was susceptible to the interpretation that payors were required to make retroactive adjustments to payments previously submitted on an entitlements basis. 7/

And, in fact, the July 26, 1983, letter from Pennzoil announcing its intent to submit retroactive payments calculated on the take basis did not purport to premise these payments on an assertion that retroactive adjustments were required under the Addendum. Rather, Pennzoil's actions were explained as being necessitated by the total failure of other payors to submit payments during the period on an entitlements basis (as they had clearly been required to) and the subsequent actions by additional payors who had tendered royalties on an entitlements basis and then "corrected" their payments to a take basis. While the propriety of these actions are not directly before us in this case, it is clear that they had no basis in the applicable procedures.

6/ As noted above, Addendum No. 1 was issued in November 1982. However, in December 1982, it was, itself, amended. This was apparently done because the original November 1982 Addendum did not make provision for reporting of sales with respect to unitization and communitization agreements involving both Federal and non-Federal lands. Compare November 1982 Addendum No. 1 at 3-4 with December 1982 Addendum No. 1 at 3-7. The language quoted in the text, however, was not changed in the December revision.

7/ The only reference to any retroactive payments appeared in the November 1982 version wherein MMS noted that "[s]hould it be determined that one or more working interests have taken substantially less than their entitlement, and as a result there is a significant potential loss or delay of royalty payments which would have otherwise been paid on an entitlements basis, MMS reserves the right to require retroactive adjustments to royalties due." Not only did this provision not direct any payor to unilaterally submit retroactive payments without MMS instruction, this provision was deleted in the December 1982 revision of Addendum No. 1, long before Pennzoil's July 26, 1983, letter.

In any event, as the foregoing demonstrates, notwithstanding any question whether Pennzoil made royalty overpayments for the 3 months in issue, and regardless whether, assuming Pennzoil did submit excess royalty payments, its actions were precipitated by MMS, Texaco has totally failed to show that it made overpayments of royalty for the period in question. Therefore, even if there are total overages on the two lease accounts for this period, MMS could not properly issue a refund to Texaco. 8/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, Minerals Management Service is affirmed as modified herein.

James L. Burski
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

8/ Texaco argues that it is now too late for Pennzoil to seek a refund, implying that the Department's delay in the adjudication of its refund request has prevented Pennzoil from pursuing its own request. Even if this assertion were correct, though we note that there is nothing in the record before us upon which we could base such a judgment, this is a matter to be raised by Pennzoil, not appellant.